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June 21, 2007

DECISION AND ORDER
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Case Name: Personnel Security Hearing

Date of Filing: December 22, 2005

Case Number: TSO-0334

This Decision concerns the eligibility of XXXXXXXXXXXXX (the individual) to hold an access authorization (also called a security clearance). A Department of Energy (DOE) Operations Office suspended the individual's access authorization under the provisions of 10 C.F.R. Part 710, entitled "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." This decision considers whether, on the basis of the evidence and testimony presented in this proceeding, the individual's access authorization should be restored. As set forth in this decision, I have determined that the individual's access authorization should be restored.

I. Background

The provisions of 10 C.F.R. Part 710 govern the eligibility of individuals who are employed by or are applicants for employment with DOE, contractors, agents, DOE access permittees, and other persons designated by the Secretary of Energy for access to classified matter or special nuclear material. Part 710 generally provides that "[t]he decision as to access authorization is a comprehensive, common-sense judgment, made after consideration of all relevant information, favorable and unfavorable, as to whether the granting or continuation of access authorization will not endanger the common defense and security and is clearly consistent with the national interest." 10 C.F.R. § 710.7(a).

The individual held a security clearance from 2000 until it was suspended in 2005. On August 19, 2005, the individual provided a letter to his employer in which he admitted that he had recently used illegal drugs. Following an interview with the individual, the local DOE security office (DOE Security) issued a Notification Letter to the individual on November 23, 2005. In that letter, DOE Security stated that it was unable to reinstate the individual's security clearance

pending the resolution of certain derogatory information that falls within the purview of two potential disqualifying criteria, Criteria K and L.¹

After receiving the Notification Letter, the individual exercised his right under Part 710 to request a hearing in this matter. 10 C.F.R. § 710.21(b). On January 5, 2006, the Director of the Office of Hearings and Appeals appointed me the hearing officer in this case. At the hearing, the individual testified on his own behalf, and called as witnesses a clinical psychiatrist, two clinical psychologists, a forensic toxicologist, his wife, and five friends and co-workers. The transcript of the hearing will be hereinafter cited as “Tr.” DOE Security submitted seven exhibits into the record and the individual submitted eight; these exhibits will be cited in this decision by their exhibit number.

II. Standard of Review

The Hearing Officer’s role in this proceeding is to evaluate the evidence presented by the agency and the individual, and to render a decision based on that evidence. *See* 10 C.F.R. § 710.27(a). Part 710 generally provides that “[t]he decision as to access authorization is a comprehensive, common-sense judgment, made after consideration of all relevant information, favorable and unfavorable, as to whether the granting or continuation of access authorization will not endanger the common defense and security and is clearly consistent with the national interest. Any doubt as to the individual’s access authorization eligibility shall be resolved in favor of national security.” 10 C.F.R. § 710.7(a). I have considered the following factors in rendering this decision: the nature, extent, and seriousness of the conduct; the circumstances surrounding the conduct; the individual’s age and maturity at the time of the conduct; the voluntariness of the individual’s participation; the absence or presence of rehabilitation or reformation and other pertinent behavioral changes; the motivation for the conduct; the potential for pressure, coercion, exploitation, or duress; the likelihood of continuance or recurrence; and other relevant factors. *See* 10 C.F.R. §§ 710.7(c), 710.27(a). The discussion below reflects my application of these factors to the testimony and evidence presented by both sides in this case.

III. Findings of Fact

By all accounts, the individual never used any illegal drugs until the summer of 2005, and has not used any since that time. On June 28, 2000, before being granted access authorization, and again on March 11, 2005, the individual signed Security Acknowledgment forms, which stated in part, “I understand that . . . my involvement with any illegal drug could result in the loss of my access authorization.” During the summer of 2005, he was a pitcher for his amateur baseball team. At post-game parties on July 3, July 10, and August 14, he inhaled cocaine, and at the

¹ Criterion K relates to information that a person “possessed, used, or experimented with a drug or other substance listed in the Schedule of Controlled Substances established pursuant to section 202 of the Controlled Substances Act of 1970 (such as marijuana, cocaine, amphetamines, barbiturates, narcotics, etc.) except as prescribed or administered by a physician licensed to dispense drugs in the practice of medicine, or as otherwise authorized by Federal law.” Criterion L relates, in relevant part, to information that a person “[e]ngaged in any unusual conduct or is subject to any circumstances which tend to show that the individual is not honest, reliable, or trustworthy; or which furnishes reason to believe that the individual may be subject to pressure, coercion, exploitation, or duress which may cause the individual to act contrary to the best interests of the national security. . . .” 10 C.F.R. § 710.8(l).

July 3 party he also smoked marijuana. Shortly after the third party, he told his wife and his supervisor what he had done, that he realized his error, and that he intended to accept the consequences and correct his ways. On August 19, he reported his conduct to his employer, by which time he had already enrolled himself in a drug abuse treatment program. By November 2005 he had completed a 24-session outpatient program. He then began attending Narcotics Anonymous and Alcoholics Anonymous meetings, participating in some 35 between November 2005 and the date of the hearing, and is working the Twelve-Step program with a sponsor.

IV. Analysis

I have thoroughly considered the record of this proceeding, including the submissions tendered in this case and the testimony of the witnesses presented at the hearing. After due deliberation, I have determined that the individual's access authorization should be restored. I find that such a restoration would not endanger the common defense and security and would be clearly consistent with the national interest. 10 C.F.R. § 710.27(a). The specific findings I make in support of this decision are discussed below.

A. Criterion K

1. The Allegations and Associated Security Concerns

To support its concerns under Criterion K, DOE Security alleges in its Notification Letter that the individual illegally used marijuana on July 3, 2005, and cocaine on July 3, July 7,² and August 14, 2005, while holding a DOE access authorization. The individual first delivered a letter to his employer on August 19, 2005, in which he stated, "I recently tried some illegal drugs and found myself liking them." He then provided the dates and the circumstances for each use during a personnel security interview conducted on September 8, 2005. DOE Exhibit (Exh.) 3.

The security concerns surrounding the use of illegal drugs are twofold. First, when an individual is under the influence of illegal drugs, his judgment may be impaired, which in turn might cause him not to properly safeguard classified materials. Second, using illegal drugs is a violation of law and may indicate a willingness to disregard other laws and rules, including those pertaining to the safeguarding of classified materials. *See Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* issued by the Assistant to the President for National Security Affairs, The White House (December 29, 2005) (Adjudicative Guidelines) at Guideline H(24). In this case, I find that the individual's history of illegal drug use, though brief, nevertheless raises questions about his reliability, trustworthiness and willingness to comply with laws, rules and regulations. For this reason, I find that DOE Security properly invoked Criterion K as a basis for suspending the individual's access authorization.

² The actual date of the second episode must have been July 10, as the individual informed the personnel security interviewer that he played his games on Sundays. DOE Exhibit (Exh.) 3 at 31-32 (Personnel Security Interview, September 8, 2005).

2. Mitigating Evidence Regarding Criterion K Allegations

Evidence mitigating the individual's use of marijuana and cocaine fall into three categories: the duration and amount of the use, the circumstances of the use, and the steps the individual pursued once he acknowledged his poor judgment and decided never to use illegal drugs again.

The evidence in the record is that the individual used marijuana once, on July 3, 2005, and cocaine three times, on July 3, July 10, and August 14, 2005. There is no evidence that the individual had ever used any illegal drugs before or after those dates. He reported to DOE Security that he took two puffs on a marijuana cigarette on July 3, 2005. DOE Exh. 3 at 30. At the hearing, the forensic toxicologist testified that the individual's involvement with marijuana carried no meaningful addictive potential. Transcript of Hearing (Tr.) at 106. The individual testified at the hearing that each of the three times he used cocaine, he inhaled a line of powder approximately one inch long by 1/16th of an inch wide. Tr. at 167. The forensic toxicologist was unable to state whether this quantity of cocaine could cause addiction, but did state that for one or two uses to be addictive, there would have to be very high doses as well as high purity. Tr. at 103.

Each episode of illegal drug use occurred under the same circumstances. Each baseball game was customarily followed by a party for both teams. He seems to have succumbed to peer pressure to try marijuana, took two puffs, "didn't like the feeling at all," and never tried it again. Tr. at 31. On each of the dates he used cocaine, the individual had pitched for his team and his pitching arm was sore. Others at the party assured him that the cocaine would relieve the soreness. Tr. at 158. He found that the cocaine had an analgesic effect. Tr. at 161. The forensic toxicologist and the psychiatrist verified that cocaine, in low doses, is a very good local anesthetic and is used for that purpose. Tr. at 38, 58-59 (nasal obstructions), 104 (eye and ear surgery). There is evidence that the individual was offered cocaine on another occasion after a baseball game that occurred on August 13, 2005. That time, the individual refused the offer; he had not pitched and was not in pain. Tr. at 225; DOE Exh. 3 at 87-89. He stopped playing amateur baseball at the end of the 2005 season and no longer associates with any of the individuals who offered him cocaine or used it with him. DOE Exh. 3 at 88.

After his third use of cocaine on August 14, 2005, the individual determined that he must stop using illegal drugs. He did not fear detection. He knew the witnesses to his drug use only through the baseball team, DOE Exh. 3 at 88, and no one in his family or at his job was aware of his use of illegal drugs. What motivated him to come forward was his conscience. He testified that he tries not to lie, and acts as a role model for many children, especially his teenaged daughter. He stated, "How can I tell somebody not do [drugs], if I'm doing [them]?" Tr. at 172. He then set about creating a "safety net" for himself. Even though he felt he was not addicted to either drug, he "wanted to utilize any tool that I could . . . to ensure that I don't do this or make a mistake like this again." Tr. at 175. He told his wife, his children, and his supervisor about his illegal drug use. On August 18, 2005, he enrolled in an intensive outpatient drug counseling program, which consisted of group and individual counseling sessions. Tr. at 172-74. On August 19, 2005, he reported his illegal drug use to his employer's security office. The counseling sessions, which he completed in November 2005, concerned addiction, chemical effects of drugs, effects of drug users on families, and relapse preventions skills. Tr. at 174-75;

Ind. Exh. 2. The individual was also referred to his employer's on-site psychologist for a review of his fitness for duty. Tr. at 177. Both his counselor and the on-site psychologist encouraged him to attend Narcotics Anonymous (NA), which he started attending while he was still participating in counseling sessions. Tr. at 178. Because his sponsor attends Alcoholics Anonymous (AA), and because both programs address recovery through the Twelve-Step process, he has been attending both NA and AA. Tr. at 179.

A clinical psychiatrist with a specialty in substance abuse evaluated the individual and presented his opinion at the hearing. His overall impression was that the individual's illegal drug use was a matter of mistake rather than a reflection of a personality trait. Tr. at 60. That is, the psychiatrist viewed the three episodes of drug use as a single exercise in poor judgment rather than a personality trait. Tr. at 28. Supported by a psychologist's test results, as well as those of a surprise drug screening (Tr. at 26), he felt confident that the individual was not deceptive by nature, and generally exhibits good judgment. He particularly felt that the fact that the individual stepped forward voluntarily to report his drug use, when it was evident that he could have escaped detection, demonstrated that the individual was not deceptive by nature, and his actions make him less likely than a randomly selected security clearance holder to be a risk to the national security in the future. Tr. at 31, 66-68. In light of the individual's serious approach to the problem, the psychiatrist expressed his opinion, with a "more than reasonable degree of medical certainty, that [the individual] does not pose a risk for future use that would compromise his security clearance." Tr. at 118-19.

The clinical psychologist who performed the testing for the clinical psychiatrist testified as well. Of the tests that were specifically designed to detect propensity for substance abuse, the individual's scores showed no such propensity. Tr. at 81 (Personality Assessment Inventory), 83 (SASSI). His conclusion was that the illegal drug use was an instance of poor judgment, but the testing revealed that the individual was not at risk of using poor judgment in general. Tr. at 93. The psychologist attributed the poor judgment to a reaction to a party context, but his self-reporting of his behavior significantly reduces the risk that the behavior will recur. Tr. at 92, 95.

The third expert to testify was the on-site clinical psychologist. He found the individual to be "more disclosive than most people" and trusted the individual's report of his drug usage. Tr. at 186-87. He testified that all drug and alcohol screens to which the individual has been subjected have been negative. Tr. at 184-85, 204. The record contains the results of 29 such tests. Ind. Exhs. 5, 8. His testing revealed no unusual personality traits, nor any sign of substance dependence. Tr. at 189, 193. He reasoned that the individual's risk of relapse is low, because he continues to participate in NA, because "he self-disclosed when he didn't have to," and because he spoke openly and straightforwardly to the psychologist about the negative impact the drug use had on his self-image, his family and his job. Tr. at 200-01.

3. Hearing Officer's Evaluation of Criterion K Evidence

The obvious security concern that illegal drug use raises is that an individual's judgment is impaired while under the influence of drugs. All the evidence in the record supports a finding that the individual used illegal drugs on three occasions within a six-week period. There is simply no evidence that he ever used illegal drugs before or after that period. The evidence

reveals that he tried marijuana on the first of those occasions, probably succumbing to the social pressure of a party he was attending, did not like it, and never touched it again. Of greater concern is his three-time cocaine use. The individual contends that he was attracted to cocaine for its analgesic, rather than its recreational, qualities. The first time, he was convinced by others that the drug would relieve the soreness in his pitching arm. He used it twice more because they were correct: the cocaine did provide relief. According to the toxicologist, the quantities of marijuana and cocaine that he used were not likely to have impaired his judgment. Moreover, it appears he was not attracted to cocaine's recreational value; offered it after a game in which he did not pitch, he refused it. After the third use, the individual acknowledged the poor judgment he had employed in deciding to use the illegal drugs and then, for personal and family reasons as well as recognition of the security concerns his use raised, set about correcting his error in the most straightforward way possible. Although the circumstances surrounding the individual's drug use do not eliminate DOE Security's concerns, it is the path he followed after his drug use that convinces me that he has mitigated those concerns.

The individual was seen by a psychiatrist, two psychologists and a substance abuse counselor. None of these professionals expressed an opinion that the individual suffers from substance abuse or substance dependence. To the contrary, their testimony was that the individual has no propensity for substance abuse but rather succumbed to poor judgment in one circumscribed area, and that he was not likely to repeat the mistake or exercise poor judgment in other aspects of his life. All of them praised his serious approach to acknowledging his error and ensuring that it does not repeat itself. He has completed a substance abuse outpatient program that he entered at his own insistence. He continues to attend AA and NA meetings and works with a mentor.

In addition, the individual has made it abundantly clear in his testimony and his written statements that he is fully committed to never using illegal drugs again. He has no contact with the individuals who introduced him to marijuana and cocaine. He has stopped playing baseball and no longer attends post-game parties, which was the sole milieu in which he used the drugs.

Given the circumstances under which he used the illegal drugs, there was virtually no likelihood that anyone in his family or within DOE Security would have ever discovered this. Once he made up his mind that he was headed down a path that he chose not to follow, he might have merely covered up his footprints. Instead, he stepped forward and acknowledged his mistake to his family and to DOE Security. To me, this demonstrates that the individual was acting on a matter of conscience. This conclusion is well supported by his statements about being a role model for his children and the children he coaches.³ After considering all the evidence in the record, I find it extremely unlikely that the individual will ever use illegal drugs again, and therefore is extremely unlikely to have his judgment impaired by them in the future.

Use of illegal drugs raises an additional concern under Criterion K in that the activity is a violation of law and may indicate the individual's proclivity to disregard other laws and rules, particularly those related to the handling of classified materials. While any prior illegal drug use

³ I have also considered the relatively short passage of time—roughly seven months—between the individual's last reported use of illegal drugs and his hearing. Such a short period does not, by itself, predict that the individual will succeed in abstaining from illegal drugs in the future. Nevertheless, the sum of all the actions he took following his drug use, as discussed above, convinces me that he will succeed.

rightly raises this concern, I see no evidence in the present case that the individual's disregard for drug laws is indicative of a pattern in his life of disregard for other laws. To the contrary, my impression of the individual, based on a common-sense assessment of all the evidence before me, is that he is a responsible, straightforward, law-abiding citizen, who has placed his involvement with illegal drugs behind him.

It is my opinion that the individual has mitigated the national security concerns that his short-lived use of illegal drugs raised under Criterion K.

B. Criterion L

1. The Allegations and Associated Security Concerns

DOE Security alleges in its Notification Letter that the individual used marijuana once and cocaine three times during July and August 2005, while holding a security clearance, even though he understood that such behavior was contrary to DOE regulations. DOE Security produced copies of two DOE Security Acknowledgments, which the individual had signed in 2000 and 2005. DOE Exhs. 5, 6. Each contains language that informs the signer that involvement with illegal drugs could result in the loss of his access authorization. During the 2005 PSI, the individual admitted that he used marijuana and cocaine during July and August 2005, and acknowledged his awareness of the policies and regulations prohibiting involvement with illegal drugs. DOE Exh. 3 at 22, 27-28, 32, 38.

The security concerns under Criterion L surrounding the individual's illegal drug use relate to his knowing violation of DOE rules and regulations. Such behavior can raise questions about the individual's reliability, trustworthiness and ability to protect classified information. *See* Adjudicative Guidelines at Guideline E(15). In this case, I find that the individual's knowing violation of the terms of the Security Acknowledgments raises questions about his reliability, trustworthiness and willingness to comply with laws, rules and regulations. For this reason, I find that DOE Security properly invoked Criterion L as a basis for suspending the individual's access authorization.⁴

2. Mitigating Evidence Regarding Criterion L Allegations

As discussed fully in the above section relating to Criterion K, the period and circumstances of the individual's illegal drug use are narrowly circumscribed. The individual has candidly admitted that he used poor judgment when he used marijuana and cocaine on those three occasions. While poor judgment governed those three episodes of drug use, there is a great deal of evidence that poor judgment does not prevail in the individual's life in general. First of all, he has no history of illegal drug use other than during the summer of 2005. The testimony of several witnesses, including his wife and a number of lifelong friends, coworkers and supervisors, attests to the individual's reputation for honesty and reliability as a husband, father, coach, employee, and member of the community. Second, once the individual recognized his

⁴ The Notification Letter does not specifically address the fact that illegal drug use constitutes criminal activity, which as such raises an additional concern under Criterion L. To the extent that criminal activity may reflect a willingness to disobey other laws and rules, I have addressed this concern in Section A.3 above.

error, he acted with the responsibility and candor we would hope all holders of access authorizations would: he admitted his mistake to his family and employer, and began constructing a “safety net” to prevent such a mistake from ever happening again. Moreover, as discussed above, the mental health professionals testified that the individual was not deceptive by nature, nor prone to substance abuse or to exercising poor judgment.

The individual has impressed me as a very straightforward, honest person. All derogatory information that has raised security concerns was provided to DOE Security by the individual himself. He has not provided conflicting facts, and has been consistent in his recollection of details such as dates in the distant past. My impression of the individual’s general truthfulness and reliability is supported by the testimony of both his treating psychiatrist, who expressed his opinion that the individual is by nature honest, forthright, responsible and not deceptive, Tr. at 85, 92, 102, and the forensic psychologist, whose interpretation of psychometric test results led him to similar conclusions. Tr. at 111.

3. Hearing Officer’s Evaluation of Criterion L Evidence

Many Criterion L cases revolve around deliberate misrepresentation of facts to the LSO. Such activity raises a serious security concern under Criterion L, because DOE Security cannot be confident that the individual is providing it with reliable information about his or her activities or will provide reliable information in the future. *See* Adjudicative Guidelines at Guideline E(15) (“Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.”) Misrepresentation is not an issue, however, in the present case. It is clear to me from the individual’s testimony, from his personnel security interviews, and from the testimony of the mental health professionals who appeared at the hearing that the individual has not attempted to minimize or in any other manner misrepresent his illegal drug use.

The security concern in this case, nevertheless, is not insignificant. The individual freely admits that he tried marijuana once and inhaled cocaine three times during the summer of 2005. He also freely admits that he knew he was prohibited from using illegal drugs by law and by DOE rules and regulations. From his testimony, I am convinced that, for a short period of time, he let poor judgment obscure his usual commitment to obeying laws and acting as a role model in favor of the immediate relief from pain that the cocaine offered.

I am further convinced, however, that he will not repeat the behavior in the future, for a number of reasons. At the hearing, he was very clear that he was not making any excuses for his conduct. He accepted what he had done, admitted that it was wrong, and had tried to do everything within his power to correct the wrong. Considering all that he has done—from voluntarily admitting his illegal drug use when it most likely would have passed undetected, to enrolling himself in a substance abuse treatment program, to working the Twelve Steps in NA, to renouncing any connection with those who introduced him to marijuana and cocaine—I believe that he has grown much more aware of how poor judgment can introduce itself into a situation, and he will not fall prey to it a second time.

Moreover, I believe that the individual's exercise of poor judgment is isolated not only by circumstances but also by nature. My assessment of the individual is that the poor judgment he employed during the summer of 2005 is not characteristic of his general nature, which is honest, trustworthy, and reliable. To the contrary, I see no evidence in the record that the individual has employed poor judgment or exhibited untrustworthy behavior in any other aspects of his life. As stated above in the Criterion K section, the mental health professionals' evaluations of the individual support this conclusion as well. After considering all of the above factors, I find that it is highly unlikely that the individual will exercise in the future the poor judgment and unreliability he revealed by using illegal drugs while holding a security clearance. It is my opinion that the individual has mitigated the national security concerns that DOE Security has raised under Criterion L.

V. Conclusion

As explained in this Decision, I find that DOE Security properly invoked 10 C.F.R. § 710.8(k) and (l) in determining that it could not reinstate the individual's access authorization without resolving concerns raised by derogatory information it received regarding the individual. For the reasons I have described above, I find that the individual has sufficiently mitigated the security concerns raised under Criteria K and L. I therefore find that restoring the individual's access authorization would not endanger the common defense and security and would be consistent with the national interest. Accordingly, I have determined that the individual's access authorization should be restored.

William M. Schwartz
Hearing Officer
Office of Hearings and Appeals

Date: June 21, 2007